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Abortion Legislation and the Establishment Clause

ABORTION LEGISLATION AND THE ESTABLISHMENT CLAUSE*

Prefatory Statement

The subscribers to this brief* are concerned about two issues raised in briefs filed in support of appellant: First, the contention that anti-abortion legislation offends the Establishment Clause and Freedom of Religion Clause of the Constitution; and, second, the contention that society is powerless under the Constitution to legislate *any* controls over abortion.

The implications inherent in those two contentions are most serious. If a criminal law designed to protect existing but unborn life is invalid because there are concurrent thoughts on the subject in the field of religion and morals, the way will be cleared for similar attacks on a variety of legal restraints on human conduct. And if the law is powerless to protect the life of the existing but unborn child, and the life of this most helpless of all beings is thereby left to the will or whim of others, the lives of countless numbers of such children will be in jeopardy.

It is strange that during a period in our nation's development when there is serious re-examination of such problems as capital punishment, on the basis that human lives are sacred, there should arise a movement to disregard entirely the existing lives of the unborn. There is a perplexing inconsistency in this situation.

Similarly, in a period when the law has developed controls to protect the rights of the weak and the helpless, it is strange that some would withdraw from the law the right to protect the most weak and helpless of all, the conceived but unborn.

Of course, this brief is addressed to substantial issues of broad implication, and is not concerned with the specific guilt or innocence of the appellant as an individual.

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* For the facts and statute involved in this brief refer to the Introductory Comment—Abortion Litigation—published in this issue at pp. 106-07.

ARGUMENT

I.

The Right and Duty of the State to Protect Fetal Life Exists Without Violating the Establishment or Freedom of Religion Clauses of the Constitution.

A. Overlapping of Criminal Law and Morality.

Two of the amici curiae briefs supporting appellant contend that anti-abortion laws (actually *any* legal restraints on abortion) violate the constiutional prohibition against the establishment of religion or the free exercise thereof.[1] (A.C.L.U. Br. pp. 34-40; Armstrong Br. pp. 20-22.)

This contention is structured on the premise that "certain religious groups" [2] believe abortion destroys a human life. Consequently, it is argued, abortion laws constitute a perpetuation of a religious dogma.

What this argument overlooks is the inherent inevitability of concurrence of criminal law, on the one hand, with ethical, moral and religious principles on the other, for the reason that they are all concerned with human conduct. The state's prohibitions of murder and theft, for example, are not rendered invalid because they are coincidentally forbidden by the Ten Commandments.

Despite the impossibility of eliminating moral considerations from the laws of society,[3] criminal law approaches the regulation of human conduct from a direction and for a purpose essentially different from that of religion or any system of ethics or morality.[4] The

[1] U.S. Const. Amend. I; applicable to states by Amend. XIV.

[2] While the expression "certain religious groups" when read in context seems to be a euphemism for "Catholic", there is substantial non-Catholic theological opinion against abortions. For example, Deitrich Bonhoeffer, Karl Barth and Paul Ramsey, all eminent Protestant theologians, have written strongly against abortions and in favor of the unborn child's right to life (Quoted at length in McLaughlin, *Abortion*, Catholic Mind, Jan., 1969, pp. 26, 27).

[3] Discussed in Harding, *Law Without Morality?* RELIGION, MORALITY AND LAW, (Southern Methodist University Press, 1956).

[4] Professor Paul Ramsey, Harrington Spear Professor of Religion at Princeton University, stated in his paper to the *International Conference on Abortion*, sponsored by Harvard Divinity School and Joseph P. Kennedy, Jr. Foundation, 1967:

> "My first point is a plea for greater sanity in the debate about abortion law reform. This plea is against the credence that is currently given to the contention that anyone who opposes some, any, or all of the proposed legal reforms must illicitly be seeking to impose his religious opinions or those of one religion in our society upon the rest of us."

validity of criminal laws can be judged from the viewpoint solely of whether they are proper for the state, without regard to some concurrent debate which might occur, especially in a pluralistic society, among those professing various approaches to theology or morality.

It is not the function of the courts to resolve disputes concerning theology or dogma, as the United States Supreme Court recently reiterated in *Presbyterian Church in the United States* v. *Hull,* U.S. Sup. Ct. Bulletin, p. B577. But this will not relieve the courts of the necessity of rendering decisions as to the proper role of the state in a field which overlaps into the area of morality or moral theology.

The problem of obscenity, for example, has generated debate among writers of differing schools and opinions in the field of morals.[5] But the existence of this debate has not hampered the courts from deciding, in case after case, problems of obscenity, not from the viewpoint of religion or of morality *per se,* but from the viewpoint of the proper role of the state.

Similarly, there are recognized writers, such as Glanville Williams,[6] and clergymen, such as Joseph Fletcher,[7] who advocate not only abortion, but euthanasia. But no court has held that a possible or existing moral and religious difference of opinion over the ultimate implications of the sanctity of life precludes the state from prohibiting these killings or the courts from determining any issues arising therefrom.

In the present case, the court is confronted with the necessity of determining whether the state has *any* right to restrict abortions. This requires a consideration of the proper role of the civil authorities; which issue can be, and should be, met without becoming involved in the dogma or tenets or beliefs of religion or any religious group. The fundamental question is whether or not the state has a legitimate interest or duty in prohibiting or regulating attacks

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[5] A quotation in the A.C.L.U. Brief, (page 36) strongly suggests the view that all obscenity and what were termed "morality" laws are unconstitutional as not consistent with the separation of Church and State. This points to the doors which would be opened if the A.C.L.U. succeeded in its contention here. It would be interesting to know if the writer of the brief would apply the same reasoning to euthanasia.

[6] Glanville Williams, *The Sanctity of Life and the Criminal Law,* Ch. VIII, Alfred V. Knopf, 1957.

[7] Fletcher, *Moral Responsibility,* The Westminster Press, Ch. IX (paperback ed.).

on fetal life, and the fact that certain religious groups attach to such life a dignity and sanctity which is apparently denied by those who believe this is not a matter for state interference at all, is irrelevant to the issue.[8]

The nature of the problems arising if the religious issue is raised is demonstrated by the very argument advanced by the A.C.L.U. For example, the argument is replete with references to a "current religious position of particular church groups" that the life of the fetus arises at the moment of conception, which position, it is argued, "is not generally accepted by the public." To suggest that the court should determine the precise character or the efficacy or the popularity of a proposition of moral theology, as such, is to impose on the court a function, the very exercise of which would raise serious questions, not only of propriety, but of constitutionality under the holding of *Presbyterian Church v. Hull, supra.*

Of course, in determining the issue of the validity of abortion restraints, the court cannot withdraw from the necessity to make a serious appraisal of the nature of the life which is taken in an abortion, in order to distinguish the implications of an abortion from those involved in surgery such as an appendectomy. If it were certain that a fetus were nothing more than an appendage of its mother, with no vestigae of individuality or potentiality of its own, abortion laws could be approached with some justifiable reserve. But these considerations must be confined to the secular and natural

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[8] Representatives of the fields of ethics, law, medicine and social sciences met in September, 1967 at Washington, D.C. at an International Conference on Abortion sponsored by the Harvard Divinity School and Joseph P. Kennedy Foundation. The Panel of ethicians, representing a spectrum of moral opinions, did agree on the following:

> "From the present available data, we can only conclude that human life begins at conception, or no later than "blastocyst" (about 8 days after fertilization). The fetus, therefore, at least from blastocyst, deserves respect as human fetal life." (Summary Reports of Working Groups, International Conference on Abortion).

The concurrence of opinion among ethicians that human fetal life deserves respect should be viewed with the undoubted concurrence of all men of goodwill with the admonition "thou shall not kill."

It has been stated:

> "Even though this commandment in a part of religious belief, it is also inherent in human nature, ratified by the unfailing experience of time itself and in all diversities of peoples and in all areas. It therefore needs no reference to chapter and verse." (James Frances Cardinal McIntyre, unpublished paper, 1969).

The power of the legislature to protect fetal life should be considered in the light of the concurrence described above.

order, within the competence and authority of the court, and without the necessity of choosing one theological position over another.

For example, there are substantial physiological indicia that the embryo or fetus is in essence vitally different from mere living tissue. From the moment of conception, its sex and the color of its eyes and hair are fixed by the genes and, before most abortions are performed, actions of the heart is actually incipient. Nothing need be added except nourishment for it to develop, grow and mature. These considerations are not dogmatic or theological, so as to be separated from the role of the court, but are physiological and secular.[9]

Also, the recognition which the law has historically and increasingly furnished to the "humanity" and "personality" of conceived but unborn children (as elaborated upon elsewhere in this brief) is not religious or sectarian, but is especially suitable for the consideration of the court.

On the other hand, such problems as when an unborn child is animated by a human soul is strictly theological and outside the area in which the courts should function. Because of this, the gratuitous and not wholly accurate descriptions of the theology of those religions which oppose abortion, as contained in the A.C.L.U. brief, should not be given weight.

B. Nature and Protectibility of Fetal Life Cannot Be Determined by Public Opinion Polls.

Nor should the basic issue whether an existing but unborn child is of such nature or potentiality that the law can constitutionally protect it be determined by speculations as to public opinion (A.C. L.U. Br. p. 38) even if those speculations were supported and fully accurate, for if the existing but unborn life is indeed deserving of the law's protection, it is just such a life, weak and helpless (as well as innocent), that the law should protect above all as a matter of fundamental justice or natural law, regardless of fluctuations of public opinion on matters which are not particularly susceptible to determination by polls and tabulations.

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[9] It would be most difficult for anyone to view the photographs of human fetal development made by Lennart Nilsson without recognizing the physical humanity of fetal life. These photographs appear after page 46 of *"The Terrible Choice"*, a report of the International Conference on Abortion referred to above. (Bantam Book, 1968.)

As the United States Supreme Court has stated in the famous *Scottsboro* case concerning the helpless:

> "Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with the whole power of the State arrayed against him, prosecuted by counsel for the State without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, State or Federal, would hesitate so to decide . . ."
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> *Powell v. Alabama,* 287 U.S. 45.

The necessity of isolating from the vagaries of public opinion the basic protections guaranteed persons by the natural law and the Constitution is illustrated in the field of civil rights and civil liberties, where the object of the law's protection is often alone and helpless in a hostile society. But who can be more helpless and alone than a child conceived but not yet born, whose mother wants to take its life? If the law is zealous to protect minorities, and even to protect confessed criminals, from the arbitrary actions of others (even if those others constitute a majority), how can this zeal be denied the existing but unborn child on the basis of some public opinion poll?

C. The Law Cannot Leave Issue of Nature of Fetal Life to Individual Decision.

It is the proper, and indeed essential, obligation of the law to protect the weak and the helpless, especially if they be in the minority. Therefore, it is not sufficient to say that there is a difference of opinion among good and well-meaning people about the obligation to surround the existing but unborn with protection. This cannot be left, as has been advocated, to the subjective determinations of the mother, who, of all persons, when under such stress of circumstances that she would contemplate abortion is least likely to make a dispassionate and objective determination of the rights and dignity of the child she is carrying; nor can it be said that laws protecting this life from the decisions of a woman in such stress will violate her constitutional rights or infringe on religious freedom.

The dangers which would result if decisions as to the nature, dignity and protectibility of life were to be left to subjective determination by others is apparent when the full implications are considered. For example, there are those who believe that a child has not acquired humanity until the severance of the umbilical cord, and a plausible argument can even be made that a child is not fully human, because not fully rational, until some later age.[10] Nevertheless, can it be seriously suggested that a law prohibiting the killing of a child at the moment of birth with its umbilical cord intact or a law which prohibits infanticide would be an unconstitutional invasion of religious liberty or that it violates the right of privacy, equal protection or due process of the mother?

D. Impossibility of Asserting That Fetal Life Is Not Human From Conception.

Those who propose that all abortion laws are unconstitutional are necessarily premising their position on the proposition that fetal life has no right to protection. But at what point, they might well be asked, does human life acquire protectability? At some moment before birth? At birth itself? When the umbilical cord is cut? When the child is no longer dependent on its mother? When the child has become fully rational? And if the answer is that at *some* time before birth protectability attaches, at precisely what time does this occur and on what grounds is the determination to be made? At viability? At quickening?

There are many who have expressed *opinions* concerning their *belief* as to when a child becomes a person. But no one has ever been heard to state that he *knows* as a matter of established fact that a life does not acquire humanity until birth or viability or quickening or some other time. Those who would contest the constitutionality of laws protecting such life should, it would seem in view of their own conceded uncertainty as to the character of such life, have the burden of proof that this life is *not* human or a person or of such worth or dignity as to be protectible under the law, for a mistake would be a deadly one to countless numbers of innocent lives. But they have not even attempted to meet this burden of proof. Consequently, they are arguing in effect:

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[10] Population Study Commission Report to the Governor, State of California, Dec. 20, 1966, p. 40, n.57.

> "We are not too sure just what this life really is which is the victim of an abortion, so let us resolve this doubt by killing it."

On the other hand, can they deny the state the right to say:

> "There is overwhelming physiological evidence that embryonic life is unique and distinct from its mother at the moment of conception, and has such a potential in its own growth and development as to give it individuality, personality and dignity; and in view of the fact that the law has traditionally recognized such life as possessing legal rights from the moment of conception, it would be inconsistent to deny it the right which precedes and supersedes all other rights—the right to live. Under these circumstances, without passing on any theological propositions or belief, we feel that this life is not only deserving of the law's protection, but is entitled to demand, as a matter of fundamental justice, that the law protect it."

E. Cannot Hold Anti-Abortion Laws Unconstitutinal Without Holding Legislators' Beliefs Concerning Nature of Fetal Life Clearly Unreasonable.

It is not clear whether the proponents of appellant's position are suggesting that the court merely shut its eyes or avert its attention from the problem as to the nature of fetal life, or whether the court is being asked specifically to make a determination that this life is *not* a person, is *not* human, has *no* potentiality to distinguish it from mere tissue, has *no* individuality and has *nothing* to invite or to permit the protection of the law.

It is hereby suggested that any proposal that the issue be avoided or evaded cannot properly be followed. Any holding that laws restricting abortion are unconstitutional could be supportable *only* by a determination that conceived but unborn life is not entitled to the law's protection. This necessarily requires consideration of the nature of that life. Protectibility cannot be excluded in the peremptory fashion proposed in these briefs without necessarily holding that the fetus has none of the attributes which would justify protection. Actually, this statement should be even more emphatic. The court cannot hold these laws unconstitutional without necessarily determining that it would be entirely unreasonable and arbitrary for the legislature to decide,

in the exercise of its lawmaking authority, that fetal life is of such nature as to even permit the law's protection.[11]

This is asking the court to exercise a pre-emption of wisdom which few, if any, men would feel qualified to assume.

But how else could the court decide that laws designed to protect fetal life are unconstitutional without of necessity making the predetermination that the legislators would be unreasonable in enacting legislation based upon the protectibility of life between conception and birth? And in order to rule out protectability, the court must rule out as frivolous and unworthy of credence the belief on the part of the legislators that prenatal life is a person, is human, has individuality, is not a mere appendage of its mother, or is of such nature that its potentiality gives it dignity and distincion. Moreover, the court would have to rule out as unreasonable those legislators whose consciences require them to resolve any doubt in favor of the unborn child.

It is suggested here that no one has ever had the temerity to make these assertions, and it is an imposition to ask the court to reach a conclusion necessarily founded on such assertions.

It is interesting to note that while the argument has been made that a law derived from the recognition of the protectability of prenatal life violates the establishment clause and infringes upon religious freedom because such life happens to be recognized by certain religious groups as possessing dignity and sanctity, there seems to be no hestitancy in proclaiming as a necessary premise to their position the antithesis of this recognition. In other words, to state that prenatal life is of such nature as to be protectable violates the religious clauses of the First Amendment; but to state that prenatal life is not of such nature as to the protectable does not violate the religious clauses of the First Amendment. It does not seem overwhelmingly fair to silence one side to the debate by stigmatizing its position as religious, while at the same time it is permissible to assert the contrary.

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[11] *Cf. Ferguson v. Skrupa*, 372 U.S. 726.

II.

There Is No Consensus of Medical Opinion Favoring the Extreme Position on Abortion Advocated in Briefs Supporting Appellant.

The amici curiae briefs in support of appellant stress the right of the physician to prescribe for his patient and contend that a law prohibiting abortions unless for reasons specifically permitted by law interferes with the right of the physician to practice medicine and with the relationship he has with his patient.

A reading of the briefs, however, creates the inevitable impression that some physicians are asking, not for the right to practice medicine freely or to apply their medical knowledge to patients to abort their patients, but for the right to permit patients to abort their pregnancies for reasons substantially removed from the scope of medical science. Complaint is voiced, for example, in the brief filed on behalf of the medical deans and others that the "mere fact of fertilization should not *ipso facto* and *io instante* abolish or limit the constitutional right of the married couple to decide whether to have a child." Complaint is made in the Armstrong brief that the exceptions in the 1967 California statutes on abortion do not include threat of deformity, nor are abortions permitted "because of family planning desires of married couples (*who need occasional safe, early abortions as a backstop when contraception fails*)". (Emphasis added.)

One of the most inartful suggestions in pro-abortion literature (and which is reflected in the briefs) is the argument that a child has the right to be born into a family where he is "wanted." Concededly, he does have this right, just as he has the right to be born into a family not burdened with poverty and just as he has the right not to be born in a slum or under conditions where he will live a lifetime of discrimination and oppression. But all this does not mean that his life is to be taken from him so that he will not be deprived of these rights. These problems should be met, but not by taking the life of the victim of these problems.

One of the vital questions in the position of the medical profession in the matter of abortion is whether the mother alone is the patient, or whether the physician owes a professional obligation toward the child.[12] Doctor Roy Heffernan, Emeritus Clinical

[12] See Liley, *The Fetus Becomes a Patient*, 198 J.A.M.A. 43 (1966).

Professor of Obstetrics and Gynecology at Tufts University School of Medicine, is quoted as saying:

> "Abortion has been repugnant to doctors since the beginning of time. The pagan Hippocrates, centuries before Christ, spoke against abortion. Down through the years, every doctor worth his salt, has dedicated his life to the relief of suffering and the saving of human life. And to be the deliberate executioner of a little life entrusted to his care must be doubly repugnant to any conscientious physician." (Lowe, *Abortion and the Law*, p. 67.)

Dr. Heffernan makes it clear that, in his opinion, unfailing opposition to abortion does not depend upon any particular philosophy or any particular set of religious beliefs. He believes that "the natural sense of morality and humanitarian feeling which any good doctor ought to possess demands that doctors refrain from the artificial termination of pregnancy in any woman, no matter what her physical, mental, or economic condition," (Op. cit. p. 66). As to the necessity of an abortion, even to save the life of the mother, Dr. Heffernan states:

> "I can say definitely that in over forty years of obstetrics, I have never yet seen any patient with any complications that I believe could be relieved by abortion. In many instances, abortion would have been far more expedient, would have been far easier as a solution to a difficult problem. Many of the patients I treated had serious heart disease and other complications. I was forced to work very hard at providing proper treatment and care. Sometimes my patients were forced to have long and expensive periods of hospitalization. But, surely, all this is but a small price to pay for a human life. When my patient finally had her child, and the little baby she had been carrying was a living human being, I certainly never regretted taking the course that I had." (Op. cit. p. 68.)

There has been some endeavor on behalf of appellant to give the impression that there is a consensus in the medical profession concerning proper indications for therapeutic abortion, and particularly favoring the extreme position advocated in these briefs. Concededly, there are many physicians who favor some liberalization of abortion laws; but in its policy statement adopted June 21, 1967 concerning therapeutic abortion, the American Medical

Association made it clear that there is no consensus among physicians as to the medical justification for abortion. This statement is introduced as follows:

> "The American Medical Association is cognizant of the fact that there is no consensus among physicians regarding the medical indications for therapeutic abortion." (*Policy Statement of the American Medical Association on Therapeutic Abortion*—adopted June 21, 1967.)

It should not be overlooked that the thrust of the argument in support of appellant in the present case is against *all* restraint on abortion. Not only is this made clear in the briefs, but if the statute under which the defendant was prosecuted, wherein abortion is prohibited except where necessary to save the life of the mother, is found unconstitutional, notwithstanding the prevalence of such legislation throughout the nation, the result will be to deprive the states of the right to act at all in this field. Any impression that the medical profession, as such, favors such an extreme position, is incorrect. The statement from the American Medical Association, referred to above, would permit abortion only under the most restricted circumstances.

A statement issued by the American College of Obstetricians and Gynecologists, and approved by their executive board on May 9, 1968, was introduced as follows:

> "It is formally stated that the College will not condone nor support the concept that an abortion be considered or performed for an unwanted pregnancy or as a means of population control. It is emphasized that the inherent risk of such an abortion is not fully appreciated, both by many in the profession and certainly not by the public. Where abortions may be obtained on demand, as in Japan and the Soviet Union, medical authorities from both these nations indicate that the physical and psychological sequelae are still to be determined." (The American College of Obstetricians and Gynecologists, *Introduction to Statement on Therapeutic Abortion,* May 9, 1968.)

The foregoing statement should be contrasted with the argument that the decision should be left to the control of the mother to decide whether or not she will bear a child, and with the optimistic and unsupported statement that an abortion is relatively harmless and even safer than carrying a child full term.

It has been stated by a medical authority:

> "The more urgent the physical indications for therapeutic abortion, the greater the contra-indications because of the hazard of the operation.—Over the years, a goodly number of patients have refused the operative intervention which we recommended and from these brave women (or stubborn, senseless women as you would have it) we have learned more about the true indications for therapeutic abortion than from all the articles that have been written on the subject." (K. P. Russell, quoted by C. P. Harrison, *On the Futility of Legalizing Abortion,* the Canadian Medical Association Journal, August 20, 1966.)

It has been pointed out in a preceding section to this brief that physiological data support the individuality, personality and humanity of conceived but unborn life. It is suggested that the reluctance of the medical profession to reach any consensus concerning indications for therapeutic abortion, as stated by the American Medical Association, must be prompted in part by their recognition of the physiological evidence. T. N. A. Jeffcoate, writing in the British Medical Journal in 1960, and quoted by Harrison, *supra,* has stated:

> "The destruction of the living embryo offends something fundamental in human nature, and the most scientifically detached gynecologist cannot fail to approach the operation with an uneasiness which has been variously accredited to 'primordial revulsion' and 'subtle, archaic motives'."

It has been stated by another authority:

> "The joining of sperm and egg in conception creates a truly unique individual that carries a bit of all mankind and much that has never existed before. The embryo and fetus are not developmentally the same as a newborn child, but biologically they are a part of humanity. There are times in the development of the fetus when I, as a physician, might feel its survival is less important than a calculated threat to the mother. There is in my opinion no time when its value can be completely rejected and it is dubious that one can clearly 'help' it by destroying it." (Kenneth J. Ryan, *A Scale of Values,* an Essay on the Medical Indications for Therapeutic Abortion.)

It should be clear that there is no consensus of medical opinion favoring abortion at the will or whim of the mother, and that the effort pursued in the present case to eliminate all legal restrictions on abortion remains a grievous and dangerous endeavor with the probability of appalling consequences.

III.

A Child Conceived but Not Yet Born Has Many Rights Recognized and Protected by Law, Including the Right to Life, and Laws Designed to Protect This Right Are Not Unconstitutional.

Other briefs filed herein have demonstrated most cogently the development of the law to the point where it recognizes that a conceived but unborn child has legally protected rights.

The opposition has expressed some displeasure over the use of the term "conceived but unborn child" with reference to what they would prefer to term an "embryo", a "fetus", "conceptus," a "zygote," a "blastocyst," or some other even more unpleasant designation. However, the term "child" for the conceived but unborn existence has good authority, particularly in California, Civil Code Section 29 commences as follows:

> "*A child, conceived, but not yet born,* is to be deemed an existing person . . ."

Penal Code Section 270, covering the obligation of a father to support a minor child, states, in part:

> "*A child conceived, but not yet born,* is to be deemed an existing person insofar as this section is concerned."

Civil Code Section 196a, which covers the obligation of support of an illegitimate child has been held in *Kyne v. Kyne,* 38 Cal. App. 2d 122 to refer to "an unborn child" in the following language:

> "Under such circumstances, Section 29 must be read together with Section 196a so as to confer the right of *an unborn child* to a guardian *ad litem* to compel the right to support conferred by the code."

Scott v. McPheeters, 33 Cal. App. 2d 629, is replete with references to "unborn child", refers to the duty of the father to unborn child and states:

> ". . . *every child, while in gestation,* needs the materials for which to form bone, tissue, nerves and the other components of its bodily structure. Without them it cannot grow or develop, or continue to live."

Accordingly, the use of the term "unborn child" is not, as has been implied, an unwarranted appeal to the emotions. It is based on the most respectable authority, particularly, in the context of a confrontation concerning the human rights of that child.

It would be an uncomfortable and strange inconsistency in the law if no one could injure a conceived but unborn child without being held accountable for that injury, but he could kill the child without recourse.

It is conceded by all that a conceived, but unborn child (under any appellation one may select) is entitled to a substantial number of rights, including property rights, inheritance rights, and the right to be free of injury. It seems to follow with irresistible logic that if a being is recognized as a person for the possession of *any* rights, the right to *life* cannot be ignored as though the concept were entirely irrelevant. It has been urged that these rights do not really attach unless the child is born. This, however, is an oversimplification. Some rights, by their very nature, even though they exist prior to birth, cannot be given financial recognition until the child is born. The right to recover for injuries, for example, would be most difficult to enforce unless the child is born and the existence and extent of the injuries inflicted before birth, in violation of its rights, are subject to observation. But this is not to deny that the child has a right, before he is born, not to be injured, just as he has the right to inherit or to hold property.

Other rights, however, are subject not only to recognition but to actual enforcement prior to birth. In *Kyne v. Kyne,* 38 Cal. App. 2d 122, not only was it declared that the conceived, but unborn child has a right to be supported by its father before birth, but that the unborn child has a right to have a guardian *ad litem* appointed to compel enforcement of this right. In fact, the court stated:

> "It would be a strange doctrine to hold that a father was criminally liable for failure to support an unborn child, but that there was no civil action by which the unborn child, through its guardian, could enforce that responsibility."

Although it appears clear that the right to support which the existing, but unborn child possesses is necessarily founded on a right to life, this right was recognized under the most dramatic circumstances in *Raleigh Fitkin—Paul Morgan Mem. Hospital v. Anderson,* 4 N. J. 421, 201 A. 2d 537 (cert. denied 377 U.S. 985) where the court placed this right to life above that right which the law so zealously protects, the right of free religious conscience in the mother. It is no answer to say that the mother, preferred life, as has been suggested. Of course, she did; but she considered her own conscience paramount, and resisted efforts to force her to have a transfusion. The court held the child was entitled to a guardian to compel its mother to submit to the transfusion, not to protect the life of the mother, but to protect the life of the child.

The right to life is a sacred one, deemed inalienable by the Declaration of Independence and protected, insofar as applicable here, by the Fourteenth Amendment to the United States Constitution. In these circumstances, in view of the status the law has recognized as applying to a conceived, but unborn child, from property rights, to the right to be free of injury, to the right to life itself, it is submitted that the action by the legislature to protect that right to life in its prohibition against abortion is immune from attack.

Conclusion.

By reason of the foregoing, and the reasoning contained in the other briefs in support of respondent, it is believed that the court should decide that the state has the right, and, indeed the duty, to protect conceived, but unborn human life, and that laws seeking to perform that function do not thereby violate constitutional restraints.**

** This brief was respectfully submitted by Walter R. Trinkaus, J.J. Brandlin, Thomas J. Arata, Richard D. Andrews, Cyril A. Coyle, Mazzera Snyder & DeMartini, John F. Duff, William R. Kennedy, Richard G. Logan, Curran, Golden McDevitt & Martin.